STATE OF MICHIGAN

IN THE SUPREME COURT

KENNETH GREER, as Conservator for MAKENZIE GREER, a Minor, and ELIZABETH GREER,

Plaintiffs-Appellees/ Cross-Appellants,

Sup Ct No. 149494
COA No. 334655
Kent CC No. 10-009033-NH

Vs.

ADVANTAGE HEALTH and ANITA R AVERY, MD,

Defendants-Appellants/ Cross-Appellees,

and

.TRINITY HEALTH MICHIGAN, d/b/a ST MARY'S HOSPITAL and KRISTINA MIXER, MD

Defendants.
_____/

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AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

Respectfully submitted by:
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TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

STATEMENT OF ISSUE PRESENTED v

INTEREST OF AMICUS CURIAE 1

STATEMENT OF FACTS 1

ARGUMENT 1

THE FULL AMOUNT OF MEDICAL EXPENSES BILLED, RATHER THAN A LESSER AMOUNT PAID, CONSTITUTES THE APPROPRIATE MEASURE OF RECOVERABLE DAMAGES FOR A PLAINTIFF UNDER MCL 600.6303, BECAUSE THE DIFFERENTIAL BETWEEN THE AMOUNT BILLED BY THE HEALTHCARE PROVIDER AND THAT PAID BY THE INSURER AS A RESULT OF NEGOTIATION WITH THE HEALTH CARE PROVIDER, IS A BENEFIT TO THE INSURED AS A RESULT OF THE PURCHASE OF INSURANCE, THUS CONSTITUTING AN EXCLUDED COLLATERAL SOURCE BENEFIT UNDER MCL 600.6303(4)..

CONCLUSION 7

PROOF OF SERVICE 8

INDEX OF AUTHORITIES

CASES

Greer v Advantage Health, 305 Mich App 192; 852 NW2d 198 (2014) 4

Mich Ed Ass'n v Secretary of State (on reh), 489 Mich 194; 801 NW2d 35 (2011) 5

Nasser v Auto Club Ins Ass'n, 435 Mich 33: 457 NW2d 637 (1990) 4

Velez v Tuma, 492 Mich 1; 821 NW2d 432 (2012) 4

Zwiers v Growney, 286 Mich App 38; 778 NW2d 81 (2009) 5

STATUTES

MCL 600.6303 ..... 2, 6

MCL 600.6303(4) 4, 5, 6, 7

STATEMENT OF ISSUE PRESENTED

DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE FULL AMOUNT OF MEDICAL EXPENSES BILLED, RATHER THAN A LESSER AMOUNT PAID, CONSTITUTES THE APPROPRIATE MEASURE OF RECOVERABLE DAMAGES FOR A PLAINTIFF UNDER MCL 600.6303, BECAUSE THE DIFFERENTIAL BETWEEN THE AMOUNT BILLED BY THE HEALTHCARE PROVIDER AND THAT PAID BY THE INSURER AS A RESULT OF NEGOTIATION WITH THE HEALTH CARE PROVIDER, IS A BENEFIT TO THE INSURED AS A RESULT OF THE PURCHASE OF INSURANCE, THUS CONSTITUTING AN EXCLUDED COLLATERAL SOURCE BENEFIT UNDER MCL 600.6303(4).

Plaintiff-Appellee argues "Yes"

Defendant-Appellant argues "No"

Amicus Curiae answers "Yes".

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state.

STATEMENT OF FACTS

The MAJ adopts Plaintiff's statement of facts.

INTRODUCTION

The matters brought up in the instant litigation involve two significant legal issues. The first involves the application of MCL 600.6303 in a situation where a health care provider submits charges to the insured in a certain amount, but then later accepts a lesser amount as payment in full for the charges incurred. The trial court ruled that, under the statutory scheme, the Plaintiff recovers the amount of the billing, rather than the lower amount which was later accepted as payment in full. The Court of Appeals, citing the statutory language and an unbroken string of case law interpreting it, allowed such recovery. Defendants would have this Court rule, instead, that the Plaintiff should be limited to the lesser amount.

The second involves a common situation in birth injury cases. The central focus of the case is the injuries suffered by the minor during her birth. However, the mother suffered distinct injuries of her own during the birthing of her daughter. Additionally, the father of the child and husband of the mother had an independent cause of action for the medical expenses incurred during the childbirth, as well as a derivative cause of action in loss of consortium. The trial court therefore appropriately ruled that the

settlement amount was to be apportioned prior to it being set off against the jury award on Makenzie's behalf. The Court of Appeals rejected this approach in favor of setting off the entire amount against the jury award.

Defendants' Appeal and Plaintiffs' cross-appeal were both granted in its Order dated December 16, 2014. Amicus MAJ will demonstrate that, under the language of the law, and the policies underlying it, the Court of Appeals correctly ruled that the full amount billed by the health care providers was the appropriate measure of medical expense damages, rather than the lesser amount the insurer successfully prevailed upon the hospital to accept as payment in full. Furthermore, the trial court was correct in apportioning the settlement amount among the family members, based upon their independent grounds for individual causes of action, and the Court of Appeals erred in reversing the trial court's decision.

I. THE FULL AMOUNT OF MEDICAL EXPENSES BILLED, RATHER THAN A LESSER AMOUNT PAID, CONSTITUTES THE APPROPRIATE MEASURE OF RECOVERABLE DAMAGES FOR A PLAINTIFF UNDER MCL 600.6303, BECAUSE THE DIFFERENTIAL BETWEEN THE AMOUNT BILLED BY THE HEALTHCARE PROVIDER AND THAT PAID BY THE INSURER AS A RESULT OF NEGOTIATION WITH THE HEALTH CARE PROVIDER, IS A BENEFIT TO THE INSURED AS A RESULT OF THE PURCHASE OF INSURANCE, THUS CONSTITUTING AN EXCLUDED COLLATERAL SOURCE BENEFIT UNDER MCL 600.6303(4).

This litigation revolves around the correct interpretation of MCL 600.6303 and, in particular, MCL 600.6303(4), as to whether the entirety of the amount invoiced by the medical health care provider can be claimed as damages by the Plaintiff in a personal injury lawsuit, or whether the Plaintiff is limited to the amount paid by the insurer, as governed by a negotiated discount with the health care provider. The statute in question reads as follows:

(1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

(2) The court shall determine the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source. Except for premiums on insurance which is required by law, that amount shall then be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source.

(3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or Medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

> (5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits.

The statute allows evidence of the existence of collateral source payments to be admissible only to the Court, and only after a verdict for the Plaintiff. (subsection 1). The Court then conducts the calculation of subtracting the amount paid by the collateral source from the verdict. (subsection 2). The question arises in this case how to interpret subparagraph (4), namely, how to apply the "collateral source" exception therein to a situation where the jury awarded damages in the amount billed by the health care provider, but where the insurer paid a lesser amount, based on negotiation with that health care provider. The trial court refused to reduce the amount awarded by the jury, inasmuch as the insurers had asserted liens in the amounts paid pursuant to §6303(4).

The Court of Appeals, *Greer v Advantage Health*, 305 Mich App 192; 852 NW2d 198 (2014), was then presented with the issue of how to correctly interpret subsection (4). The *Greer* opinion set forth its decision upholding the trial court's ruling on this issue, showing it to be supported by the language of the law and the policies designed to be advanced thereby:

> [B]ecause §6303 is in derogation of the common law that permits a plaintiff's double recovery when a loss was also paid by insurance, *Nasser* [*v Auto Club Ins Ass'n*, 435 Mich 33: 457 NW2d 637 (1990)] at 58, the statute must be construed consistently with its plain terms to make "the least change in the common law." *Velez* [*v Tuma*, 492 Mich 1; 821 NW2d 432 (2012)] at 17. Because insurance discounts are "benefits received or receivable from an insurance policy" within the plain meaning of §6303(4), we must conclude that the insurance discounts are also "benefits paid or payable" within the plain and ordinary meaning of the last sentence of §6303(4). The words "paid" and "payable" are both derived from the word

> "pay, which is defined as "to discharge or wattle (a debt. Obligation, etc.), as by transferring money or goods, or by doing something." *Random House Webster's College Dictionary* (1996). There appears to be no dispute that the insurance discounts here, along with cash payments, discharged or settled plaintiffs' debt or obligation to their healthcare providers. So, assuming that an insurance discount is a "benefit paid or payable" within the meaning of §6303(4), then the last sentence of subsection (4) would read: "Collateral source does not include [an insurance discount used to settle or discharge a debt of the plaintiff for medical expenses provided by [an insurance company] entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3)." Id at 211-212..

Based on the above analysis, the Greer court ruled that the last sentence of §6303(4) compels the conclusion that both the cash payment and the insurance discount are "benefits received or receivable from an insurance policy" and as such are both excluded by statute as collateral benefits. *Id.* This result is in keeping with the mandates of statutory construction in that each word is given its plain and ordinary meaning, and no part of the statute is rendered surplusage. *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009); *see also*, *Velez, supra*, at 17; *Mich Ed Ass'n v Secretary of State (on rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011).

Amicus Michigan Professional Insurance Exchange nonetheless argues that only the amount paid pursuant to the discount should be recoverable as past economic expenses, and that the amount of the differential (the amount between that which was invoiced and that which was paid by the insurer) should be deemed not to be a benefit to plaintiff. In its Statement of Interest, MPIE takes a stand that the invoiced amount cannot constitute the cost of medical services for which plaintiff is entitled to as an element of damages, because "economic damages do not include money that the plaintiff (or her insurer) never paid and will never have to pay." Amicus of MPIE at 2. However, MPIE finesses the question of WHY that money will never be paid by the

plaintiff. This Court is likely aware that, because of the existence of insurance, NONE of the amount of the invoice – neither the amount eventually paid by the insurer or the differential between that amount and the amount invoiced – was ever paid or will ever have to be paid by the insured Plaintiff. The reason for this is, again, the very presence of insurance. Someone with no insurance would be forced to pay the invoiced amount, or, at the least, be forced to engage in negotiations with the health care providers with the invoiced amount as a starting point. Thus, the differential between the insurance discount and the amount invoiced was achieved by the virtue of the plaintiff being insured – thus clearly constituting a benefit to the plaintiff under §6303(4). Again, it qualifies as an excluded collateral source under §6303(4).

The Michigan State Medical Society achieves the same result by focusing solely on the term "lien" in the statute, and then reasoning that only the amount to which a lien is asserted can be recoverable under MCL 600.6303. Indeed, it states, without citation, that the "obvious effect of the collateral source setoff statute is to allow a plaintiff to recover for paid medical expenses only in those instances where the benefits to be repaid to the provider pursuant to a properly exercised lien." MSMS amicus brief at 5. This Court, like the *Greer* panel in the Court of Appeals, is not empowered to undertake "obvious" interpretations of statutory language unless those interpretations are actually borne out by the wording of the statute. Here, §6303(4) is unequivocal – if a benefit is enjoyed by an insured as a result of his or her purchase of insurance, such benefit Therefore it is an excluded collateral source which cannot serve to diminish the amount of recovery to the plaintiff.

CONCLUSION

This Court must interpret §6303(4) so as to properly give weight to the actual language of the statute. It is not empowered to impose upon such language a remedy not specifically set out in such language, no matter how desirable or efficacious such imposition might seem. The Greer panel got it right. Pursuant to the last sentence of §6303(4), both the amount actually charged by the insurer and the differential between the amount actually charged and the amount invoiced constitute an excluded collateral sources which cannot serve to diminish the amount of damages awarded by the jury. This Court should affirm.

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